Affirmed and Opinion filed July 26, 2001.

In The

Fourteenth Court of Appeals

NO. 14-98-00947-CR

MUTAZ SAMAN KHALAF, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the Harris County Court at Law No. 6
Harris County, Texas
Trial Court Cause No. 98-04980

O P I N I O N

Over his plea of not guilty, a Harris County jury found appellant, Mutaz Saman Khalaf, guilty of misdemeanor indecent exposure and assessed punishment at 180 days' confinement in the Harris County Jail and a $2000 fine. In one point of error, appellant argues he was denied effective assistance of counsel because: (1) his counsel failed to properly investigate the case; (2) his counsel failed to properly exercise his peremptory strikes; (3) his counsel failed to object to certain evidence; and (4) in the punishment phase, counsel failed to offer any evidence establishing appellant's eligibility for probation. We affirm.

Ineffective Assistance of Counsel

Both the federal and state constitutions guarantee an accused the right to have the assistance of counsel. *See* U.S. CONST. AMEND. VI; TEX. CONST. Art. I, § 10; TEX. CODE CRIM. PROC. art. 1.05 (Vernon 1977). The right to counsel includes the right to reasonably effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052 (1984); *Ex parte Gonzales*, 945 S.W.2d 830, 835 (Tex. Crim. App. 1997). Both state and federal claims of ineffective assistance of counsel are evaluated under the two prong analysis articulated in *Strickland*. *See Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999); *Stults v. State*, 23 S.W.3d 198, 208-09 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). The first prong requires the appellant to demonstrate that trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *See Strickland*, 466 U.S. at 688, 104 S.Ct. 2052. To satisfy this prong, the appellant must (1) rebut the presumption that counsel is competent by identifying the acts and/or omissions of counsel that are alleged as ineffective assistance and (2) affirmatively prove that such acts and/or omissions fell below the professional norm of reasonableness. *See McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996). The reviewing court will not find ineffectiveness by isolating any portion of trial counsel's representation, but will judge the claim based on the totality of the representation. *See Thompson*, 9 S.W.3d at 813.

The second prong of *Strickland* requires the appellant to show prejudice resulting from the deficient performance of his attorney. *See Mitchell v. State*, 989 S.W.2d 747, 748 (Tex. Crim. App. 1999); *Hernandez v. State*, 988 S.W.2d 770, 772 (Tex. Crim. App. 1999). The primary reason for requiring a defendant to prove prejudice is that most ineffective assistance of counsel cases do not involve any oppressive "state action." *See Strickland*, 104 S. Ct. at 2067 ("ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice" because the "government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence"). To establish prejudice, the

appellant must prove there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *See Jackson v. State*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998). A reasonable probability is "a probability sufficient to undermine confidence in the outcome of the proceedings." *Id*. The appellant must prove his claims by a preponderance of the evidence. *See id.*

The exceptions to the second prong of *Strickland* rule, are the "actual or constructive denial of the assistance of counsel altogether," various kinds of "state interference" with counsel's assistance, and when counsel "is burdened by an actual conflict of interest," which adversely affects counsel's performance. 104 S.Ct. at 2067. In these circumstances, no affirmative proof of prejudice is required because prejudice is irrefutably presumed. *See id*.

In any case analyzing the effective assistance of counsel, we begin with the strong presumption that counsel was competent. *See Thompson*, 9 S.W.3d at 813; *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). We presume counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy. *See Jackson*, 877 S.W.2d at 771. The appellant has the burden of rebutting this presumption by presenting evidence illustrating why trial counsel did what he did. *See id.* The appellant cannot meet this burden if the record does not specifically focus on the reasons for the conduct of trial counsel. *See Stults*, 23 S.W.3d at 208; *Osorio v. State*, 994 S.W.2d 249, 253 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd). This kind of record is best developed in a hearing on an application for a writ of habeas corpus or a motion for new trial. *See Stults*, 23 S.W.3d at 209; *see also Jackson*, 973 S.W.2d at 957 (stating that when counsel is allegedly ineffective because of errors of omission, collateral attack is the better vehicle for developing an ineffectiveness claim).

When the record is silent about counsel's reasons for his conduct, finding counsel ineffective would call for speculation by the appellate court. *See Gamble v. State*, 916 S.W.2d 92, 93 (Tex. App.—Houston [1st Dist.] 1996, no pet.) (citing *Jackson v. State*, 877

S.W.2d at 771)). An appellate court will not speculate about the reasons underlying defense counsel's decisions. For this reason, it is critical for an accused relying on an ineffective assistance of counsel claim to make the necessary record in the trial court.

Peremptory Strikes

In his first example of alleged ineffective assistance, appellant argues that his trial counsel improperly used his peremptory strikes to leave on the jury an assistant district attorney. In a misdemeanor trial, each side is only entitled to three peremptory challenges. *See* TEX. CODE CRIM. PROC. ANN. Art. 35.15(c) (Vernon 1989). Here, trial counsel made five strikes on the jury sheet, with the trial court clerk only counting the first three. The district attorney was the fifth person on the list with a line through their name. Thus, the district attorney was empaneled as a juror.

Appellant points to nothing in the record suggesting that the assistant district attorney would not be an impartial juror. During his voir dire examination, the district attorney, when asked if he would be a fair juror, he responded, "Absolutely." Appellant has not established *Strickland*'s prejudice prong because he has not shown the result of the proceeding would be different if the district attorney had not been on the jury. *See Cardenas v. State*, 30 S.W.3d 384, 391-92 (Tex. Crim. App. 2000); *see also Anderson v. State*, 633 S.W.2d 851, 853 (Tex. Crim. App. 1982) ("The mere fact that a juror knows a witness and is on friendly relations with him is not a sufficient basis for disqualification."); *Esterline v. State*, 707 S.W.2d 171, 175 (Tex. App.—Corpus Christi 1986, pet. ref'd) (where juror stated that he could be fair and had not formed an opinion about guilt or innocence, the trial court did not err in overruling challenge for cause even though juror was a police officer and knew the police officers who would testify at trial).

Investigation

In his next example of alleged ineffective assistance, appellant contends that trial counsel failed to properly investigate the facts of the case. Counsel is charged with making an independent investigation of the facts of the case. *McFarland v. State*, 928

S.W.2d 482, 501 (Tex. Crim. App. 1996). Ordinarily counsel should not blindly rely on the veracity either of his client's version of the facts or witness statements in the State's file. *Id*. But this duty to investigate, at least since *Strickland* was decided, is not categorical. Rather, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691, 104 S.Ct. at 2066, 80 L.Ed.2d at 695. Such a decision not to investigate "must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id*. In any event, we will not reverse a conviction unless the consequence of the failure to investigate is that the only viable defense available to the accused is not advanced and there is a reasonable probability that, but for counsel's failure to advance the defense, the result of the proceeding would have been different. *McFarland*, 928 S.W.2d at 501 (citing *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068)).

The record shows that trial counsel discussed the case with appellant, interviewed each witness given to him by appellant, i.e., his brother, sister and his wife, talked to the private investigator hired for the case, visited the crime scene, discussed the case with appellant's previous attorney and went over the previous attorney's notes, held mock trials and had appellant practice answering trial questions. Trial counsel also called these three witnesses, who each testified they were in appellant's apartment on the morning of the incident. Finally, trial counsel offered evidence rebutting the witnesses' testimony about extraneous acts of indecent exposure. We find appellant has not shown that any new or helpful information would have been acquired or that this decision in any way limited or impeded appellant's defense. *See McFarland*, 928 S.W.2d at 501 (citing *Wilkerson v. State*, 726 S.W.2d 542, 550 (Tex. Crim. App. 1986)).

Appellant also argues that trial counsel's failure to investigate exhibited itself in counsel's improper closing argument and the failure to understand the charges against appellant. However, these deficiencies are not alone sufficient to amount to ineffective counsel under *Strickland*. Additionally, the subject of trial counsel's closing argument was not addressed in the motion for new trial hearing. Thus, the record is silent as to

whether counsel's argument was a matter of trial strategy. *See Stults*, 23 S.W.3d at 209. Accordingly, appellant fails to satisfy, if not the deficiency prong of *Strickland*, then the prejudice prong; because he cannot show a reasonable probability that had counsel properly investigated the claim, the result of the proceeding would have been different.

Extraneous Offenses

In his third example of alleged ineffective assistance, appellant argues that trial counsel failed to object to evidence of certain extraneous offenses. Specifically, appellant contends the two extraneous-act witnesses' testimony was inadmissible under Evidence Rule 404(b) and a proper objection by counsel would have resulted in the testimony being excluded.

Although defense counsel did not request notice of the state's intent to use evidence of extraneous acts, he did file a motion in limine, on which the court did not rule. This motion requested that the trial court first conduct a hearing outside the presence of the jury to determine the admissibility of extraneous offenses. Prior to an extraneous-act witness's testimony, the trial court conducted such a hearing and ruled her testimony admissible. Even if trial counsel had failed to file the motion, we have previously stated that failure to file pretrial motions, in itself, is not ineffective assistance. *See Huynh v. State*, 833 S.W.2d 636, 638 (Tex. App.—Houston [14th Dist.] 1992, no pet.).

Here, the record is silent as to whether trial counsel's failure to object to the extraneous offenses was a matter of trial strategy, and if so, whether the strategy was sound. Failure to make the required showing of deficient performance defeats appellant's ineffectiveness claim. *See Thompson*, 9 S.W.3d at 814; *Stults*, 23 S.W.3d at 208. Accordingly, appellant's allegation that trial counsel was ineffective for failing to object to certain evidence is not affirmatively supported by the record and is not reviewable in the instant direct appeal.

Failure to Offer Evidence of Probation Eligibility

Appellant next contends that trial counsel failed to establish his eligibility for probation during the punishment stage of the trial. A defendant in a criminal proceeding is eligible for community supervision in a misdemeanor case if he files a sworn motion prior to trial stating he has never before been convicted of a felony, and the jury finds that to be true. TEX. CODE CRIM. PROC. ANN. Art. 42.12, § 4(e) (Vernon Supp. 2000). Appellant filed a proper motion to have the jury determine if appellant was eligible for probation. However, trial counsel did not put on any evidence proving the sworn allegations of the motion. Thus, appellant contends, he was deficient in his performance because he was not allowed to argue to the jury for probation.

However, the record reflects that trial counsel was not prevented from arguing for probation. His entire argument urged the jury to place his client on probation. In fact, appellant concedes the jury had the opportunity in the charge to recommend probation. Thus, appellant's opportunity for probation was not lost because of trial counsel's performance. Furthermore, the record is silent as to whether defense counsel employed a trial strategy in not presenting evidence to support a finding that his client had never been convicted of a felony. Thus, where the record is silent as to counsel's trial strategy, *see Thompson*, 9 S.W.3d at 814; *Stults*, 23 S.W.3d at 208, we may not speculate about trial counsel's actions.

Conclusion

Because we are unable to find that trial counsel's actions fell below an objective standard, we overrule appellant's sole point of error. Having overruled appellant's sole point of error, we affirm the trial court's judgment.

/s/ Norman Lee

Justice

Judgment rendered and Opinion filed July 26, 2001.

Panel consists of Justices Lee, Amidei and Andell.*

Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justice Lee, Former Justices Maurice Amidei and Eric Andell sitting by assignment.